Mississippi Public Defenders Conference

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APPELLATE COURT UPDATE

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UNITED STATES SUPREME COURT CASES

Rodriguez v. United States, 135 S.Ct. 1609, (April 21, 2015)

- Police pulled over a vehicle driven by Rodriguez after his vehicle veered onto the shoulder of the highway. The officer issued a written warning and then asked if he could walk the K-9 dog around Rodriguez's vehicle.
- Rodriguez refused, but the officer instructed him to exit the vehicle and then walked the dog around the car.

Rodriguez (cont.)

- The dog alerted to the presence of drugs, and a large bag of methamphetamine was found.
- The search resulted in a seven to eight minute extension of the completed traffic stop.
- The U.S. Supreme Court reversed, holding that an extension of time beyond the original purpose of the stop, absent reasonable suspicion, violates the Constitutional protection against unreasonable search and seizure.
- A stop remains reasonable for the length of time it takes to complete the task that justified the stop. A seizure unrelated to the reason for the stop is lawful only so long as it does not measurably extend the stop's duration. Although the use of a K-9 unit may cause only a small extension of the stop, it is not fairly characterized as connected to the mission of an ordinary traffic stop and is therefore unlawful.

Ohio v. Clark, No. 13–1352 (June 18, 2015)

- In 2010, a preschool teacher noticed some facial injuries on one of her three-year-old students. When the teacher inquired about the injuries, the student indicated that his mother's boyfriend, Darius Clark, caused them.
- The teacher forwarded her concerns to a child-abuse hotline, which resulted in the arrest and subsequent charging of Clark for child abuse. At trial, the court allowed testimony by the preschool teacher of the child's identification of Clark as the abuser. Clark was convicted, but the Ohio Supreme Court determined that the statements were testimonial and should have been excluded because they served the purpose of being used in prosecution.
- Because state law required the teacher to report suspected incidences of child abuse, the teacher was acting as an agent for law enforcement when inquiring about the child's injuries.

Clark (cont.)

- The U.S. Supreme Court reversed, finding that the three-year-old's statements were non-testimonial. The totality of the circumstances indicated that the primary purpose of the conversation was not to create an out-of-court substitute for trial testimony.
- There was an ongoing emergency because the child, who had visible injuries, could have been released into the hands of his abuser, and therefore the primary purpose of the teachers' questions was most likely to protect the child.
- Moreover, a very young child who does not understand the details of the criminal justice system is unlikely to be speaking for the purpose of creating evidence. Finally, the Court held that a mandatory reporting statute does not convert a conversation between a concerned teacher and a student into a law enforcement mission aimed primarily at gathering evidence for a prosecution.

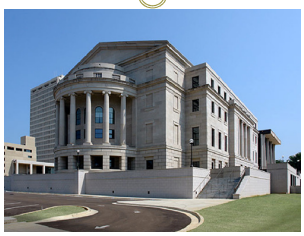
City of Los Angeles v. Patel, et al (June 22, 2015).

- The City of Los Angeles had a local ordinance that mandated hotels to retain their records for 90 days on hotel property and have records be made available for inspection by the police department on demand, without a warrant.

Patel (cont.)

- The city argued that motels are "closely regulated" businesses and are therefore subject to warrantless inspections.
- The Supreme Court held that an individual may challenge a statute for violating the Constitution on its face without needing to allege unconstitutional enforcement, and that the municipal ordinance in question is unconstitutional on its face because it does not allow for hotel operators to engage in pre-compliance review by questioning the reasonableness of the subpoena in district court.
- The type of search the municipal ordinance authorizes is an administrative one, which means that its purpose is to ensure that the hotel operators are complying with the record requirement, and judicial precedent has held that there must be an opportunity for the subpoenaed party to contest the subpoena for an administrative search before penalties are imposed.
- Such pre-compliance review is necessary to ensure that the search is not a pretext to harass the business owner. The Court also held that hotels are not a "closely regulated" business and therefore do not fall under that exception to the warrant requirement.

Mississippi Supreme Court Cases



Two Death Penalty Cases

- ***Chase v. State***, No. 2013-CA-01089-SCT, the MSSCT adopted "intellectual disability" to replace the term "mentally retarded." Also adopted updated definitions to determine intellectual disability in *Atkins* cases.
- ***Hollie v. State***, No. 2014-DP-00006-SCT, held that once a trial court orders a mental evaluation, a competency hearing is mandatory. Failure to do so is reversal error. The State's argument that Hollie is not entitled to a competency determination or new trial because Hollie waived his right to a competency hearing by pleading guilty is without merit. *See also Silvia v. State*, No. 2013-KA-01510-COA.

Isham v. State, No. 2014-KA-00038-SCT (April 23, 2015)

- Isham was convicted of felonious child abuse.
- The State's experts testified that blunt-force trauma was the only way that the victim could have received his injuries.
- The denial of funding for a defense expert prevented defendant from developing his defense.
- Although the request was filed 11 days before trial, the interest in providing a fair trial to the accused far outweighs the interest of the trial court in keeping a timely docket.

Isham (cont.)

- This is a continuation of the Mississippi Supreme Court's recent jurisprudence on indigent defendants and experts. *See Lowe v. State*.
- If the State is solely relying on an expert to prove an element of the offense, a defendant is entitled to an expert.

Taylor v. State, No. 2009-KA-00560-SCT (April 30, 2015)

- In a *Lindsey* Brief, Taylor did not raise speedy trial. After a request for supplemental briefing, Taylor lost 5-4 on a speedy trial claim.
- RAISE SPEEDY TRIAL. Though it's been declared "dead" by members of the Court, it should be raised at the trial level if such a problem exists.
  - Be sure to make the demand early.
  - Document continuances
  - File a Motion to Dismiss

Davis v. State, No. 2012-CT-00863-SCT (May 7, 2015)

- Davis was charged with grand larceny and receiving stolen goods.
- The RSG statute provides that: Evidence that the person charged under this section stole the property that is the subject of the charge of receiving stolen property is not a defense to a charge under this section; however, *dual charges of both stealing and receiving the same property shall not be brought against a single defendant in a single jurisdiction*.

Davis (cont.)

- COA accepted the State's confession of error, reversed, and remanded the case for further proceedings.
- Davis filed cert.
- MSSC unanimously held that an acquittal of larceny prevents the State from bringing charges of RSG. The Court rendered a verdict of not guilty.

Burleson v. State, 2013-KA-772-SCT (May 21, 2015)

- Burleson, Huguley and Cartwright went to a house. Cartwright left the home, the victim was still alive. Burleson and Huguley left the house. Victim was found dead later.
- The important thing about this case is knowing how circumstantial evidence interacts with capital murder.

Burleson (cont.)

- The Court noted that there was no direct evidence that Burleson killed the victim.
- The inquiry, however, does not stop there. In a capital murder prosecution, you have to consider whether there is direct evidence of the underlying felony, which is part of the gravamen of the offense of felony capital murder.

Crook v. State, No. 2013-CT-00081-SCT (July 2, 2015)

- Conviction for violating a city ordinance requiring a rental license. The ordinance was unconstitutional.
- The ordinance allowed a judicial officer to issue a warrant "by the terms of the Rental License, lease, or rental agreement," rather than upon probable cause.
- Because each rental license contains the owner's advance consent to inspections, a significant danger exists that a building official could attempt to obtain a warrant by asserting the owner's advance consent.
- Probable cause must be the standard. Because the ordinance's warrant provision authorizes the issuance of a warrant without probable cause, it is unconstitutional.

Drummer v. State, 2012-CT-2004-SCT (June 2, 2015).

- Police saw a vehicle run through a stop sign in Mathiston, located in Webster and Choctaw Counties.
- Flashed lights and a chase began.
- After the chase ended, it was revealed that the van, trailer and the lawn mower had been stolen from businesses in Lowndes County.

Drummer (cont.)

- Drummer pled guilty to felony fleeing in Webster County. He was indicted for two counts of grand larceny and one count of attempted grand larceny in Lowndes County.
- The jury was instructed on flight.
- Lowndes jury convicted him on all three. Convicted under 99-19-81. One of the predicate felonies was the fleeing conviction.

Drummer (cont.)

- The Court reversed Drummer's habitual sentence.
- The court found that Drummer stole the items and fled when confronted by police so that he could get away with larceny. The intent was the same: "to steal . . . And not be caught."

Drummer (cont.)

- Justice Coleman's dissent focused "been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times" language of the statute.
- Justice Coleman believed that the statute was silent on any factual relationship between the predicate and primary convictions.

Taylor v. State, No. 2013-CT-00305-SCT (July 2, 2015)

- Taylor was convicted of possession of stolen property. Prior to trail, defense attorney filed a motion in limine requesting that Taylor's prior criminal history be excluded.
- The Judge didn't rule on the motion.
- When Taylor took the stand, the defense attorney withdrew his motion.

Taylor (cont.)

- In direct, Taylor offered evidence of one prior felony.
- On cross-examination, the State, with no objection, questioned Taylor about his numerous felony convictions.
- The SCT found that defense counsel's failure to object to the expansive inquiry into defendant's prior convictions was ineffective assistance of counsel apparent from the record.

Taylor (cont.)

- A defendant's choice to testify in his or her own defense does not eliminate the protection of Mississippi Rule of Evidence 404(b).

Collins v. State, No. 2013-CT-00761-SCT (August 20, 2015).

- Collins was being questioned in connection with a murder.
- He initially invoked his right to a lawyer. Fifteen minutes after invoking, he knocked on the door and asked to talk to investigators. Investigators never re-Mirandized.

Collins (cont.)

- Later in the interview, Collins requested an attorney – "ok, I'm gonna tell you this right now, not today, I mean, I need to talk to a lawyer, because I can't – I know ya'll ain't fixing to let me go man."
- That request for a lawyer was completely ignored. The detective responded with "no listen. I mean, did she try to rob you?"

Collins (cont.)

- Even later in the interview, Collins stated "I do it, but I do it with a lawyer. I need a lawyer man. I know better than that . . . ." Again, the interview continued.
- The Court found that though Collins may have spoken first, the State failed to prove that Collins re-initiated interrogation.
- The Court also called out the State for misrepresenting Collins's statements in their initial briefing in the COA.

Collins (cont.)

- Even if *Collins* did initiate conversation, the State still bore the burden of proving that the subsequent statements were given knowingly and intelligently under the totality of the circumstances.
- With Collins obviously being concerned about his job, the detective began to reiterate that the police could not do anything to help Collins "because you said you wanted your lawyer."

Collins (cont.)

- The detective could have informed Collins of an approximate time or allowed him a phone call to contact his employer, yet he instead represented to Collins that nothing could be done for him because he asked for a lawyer, appearing to use Collins's invocation of his right to counsel against him, to pressure him into a statement.
- *See Downey v. State*

Collins

- As a second issue, the Court found that the State is required to present expert testimony when presenting evidence which purports to pinpoint the general area in which the cell phone user was located based on historical cellular data.

Windless v. State, No. 2014-KA-00547-SCT (October 1, 2015).

- Windless was charged and convicted of felony capital murder with burglary being the underlying felony.
- The jury was instructed on the elements of capital murder, and burglary, but not larceny, which was the alleged underlying crime for the burglary.
- The MSSC found that in burglary cases or capital murder cases with burglary as the underlying felony, must request instruction on the crime defendant intended to commit while breaking and entering. Trial court should instruct, but it will not be reversible error if counsel does not object or request the instruction.

Windless (cont.)

- Justice Dickinson dissented,
- Simply put, I dissent because there is no way the jury properly could have found beyond a reasonable doubt that Anthony Windless intended to commit a larceny without knowing the elements, under Mississippi law, of larceny. Trial courts are not required to instruct juries on the meaning of every word in the English language. But the crime of larceny is not universal. For instance, the statutes in some states have broadened the common-law elements of larceny—which, themselves, were never provided to the jury— to include such other crimes as false pretenses and embezzlement, while others (including Mississippi) have not. The abridged ninth edition of Black's Law Dictionary defines fifteen different kinds of larceny, each with its own definition. What is worse, Mississippi statutes—which, by the way, include no crime called "larceny"—list fourteen different statutes that make certain defined larcenies. Which larceny statute applied in this case? Neither the jury nor a single justice on this Court knows. To assume, as does the plurality, that the jury understood the term "larceny" with no instruction from the trial court is, in my view, indefensible.

Mississippi Court of Appeals Cases

Williams v. State, 2013-KA-1856-COA (April 14, 2015)

- At trial, the State moved to admit the confession, but the defense objected, arguing that Williams had not been given the opportunity to cross-examine an officer regarding the waiver of his rights. The objection was overruled and Williams was convicted.
- Williams asserts that the trial court erred in failing to hold a hearing on the voluntariness of his confession. Though Williams undoubtedly made an objection to the statement's admission, the objection did not unequivocally raise the issue of voluntariness, which would mandate a hearing.
- Even though no suppression motion was filed, a confession's voluntariness may be raised for the first time at trial.
- In order to find a statement admissible, the trial judge must determine beyond a reasonable doubt that a confession was voluntary and knowing and that the defendant was given his *Miranda* rights prior to any custodial interrogation.
- By not holding a hearing, the trial court precluded Williams from putting on evidence to refute police testimony. The trial court improperly admitted the confession into evidence without ruling on the voluntariness of the statement at any point.

Clayton v. State, 2013-KA-01993-COA (May 19, 2015)

- Clayton was convicted of manslaughter and given a five year enhancement for using a firearm.

Clayton (cont.)

- The jury was only instructed to find defendant guilty of manslaughter if he killed the victim "by the use of a dangerous weapon." The jury was never specifically asked to find whether defendant used a firearm during a felony.
- Therefore, the circuit court improperly enhanced his sentence without having a jury decide every element of the firearm enhancement.

Cooper v. State, No. 2014-KA-00056-COA (June 2, 2015)

- The enhancement statute (§97-37-37(2)) for use of a firearm during a felony) applies "[e]xcept to the extent that a greater minimum sentence is otherwise provided."
- Cooper's mandatory 20-year sentence for aggravated assault as a habitual offender under §99-19-81 provides a "greater minimum sentence" than the 10-year enhancement statute. Therefore, §97-37-37(2) was inapplicable to this case. The trial court erred in imposing the additional ten-year sentence.

Chesney v. State, 2013-KA-207-COA (May 19, 2015)

Police were provided information concerning a possible identify theft. An informant implicated Chesney. Police obtained a search warrant for Chesney's residence to recover a computer "with information [related to the] identity theft."

When police arrived, Chesney told him that his laptop was at a nearby computer repair store. When the police went to execute the search warrant and recover the computer at the store, the clerk alerted them to the presence of files in the computer's recycle bin that he suspected depicted child pornography based on the names of the files. Chesney's computer was taken to the police department, and were discovered that possibly depicted child pornography. A second search warrant was obtained to look for child pornography.

At trial, defense counsel moved to suppress the evidence because the first search warrant for identity theft was not based on credible or reliable information. That motion was denied.

Chesney (cont.)

- The affidavit for the original search warrant never described the information from the informant as being reliable or credible. At the hearing on the motion to suppress, police admitted to defense counsel that he had never met or spoken with the informant prior to this incident. The threshold requirements for probable cause were not met.
- Finding that the first search warrant was invalid for lack of probable cause, the COA went on to hold that the resulting evidence obtained through the first warrant – including evidence obtained through the second search warrant and Chesney's confession – should have been suppressed.

Chesney (cont.)

- Chesney had standing to challenge the search and seizure of his computer files by police. The police issued an invalid search warrant, directing law enforcement to seize Chesney's personal computer from his home in order to look for evidence of identity theft. The police obtained the computer from the repair shop only under the purported authority of the invalid search warrant.
- The search of the computer files by the police prior to obtaining the second search warrant was a violation of Chesney's 4th Amendment rights. Chesney he had a reasonable expectation of privacy in the contents of the computer while it was waiting repair.

Chesney (cont.)

- The clerk's statement to police – that he had located files that appeared to be child pornography, was insufficient to constitute an independent source of probable cause outside the first warrant. The actual files with the pornography were found by a police technician prior to obtaining the second warrant.
- There is nothing to indicate the clerk would have independently come forward with the information regarding the photographs had police not come to seize the computer based on the first warrant.
- Clerk's comment did not "purge the taint" of the invalid first search warrant from the second warrant.

Chesney (cont.)

- The COA also found the case did not fall under the good-faith exception or the inevitable-discovery doctrine to the exclusionary rule. Any reliance by the police on the underlying facts to support probable cause for the first warrant was "entirely unreasonable," so the good faith exception can not apply.

Quick Hits

- ***Boyd v. State***, No. 2014-KA-00404-SCT. The Court clarified that *Smith* does not stand for the proposition that the State must authenticate electronic communications by subpoenaing the telephone company and obtaining global positioning information for each message sent to prove that a person authored the messages in question. *Smith* provides that other "peculiar circumstances" may establish authenticity. The facts in this case provided sufficient authentication
- ***Franklin v. State***, No. 2013-KA-01880-SCT. Court seems to be backing away from *Downey v. State*, which held the Mississippi Constitution provides greater protection than the federal Constitution regarding invocations to the right to counsel. Also, a reminder to object at trial to contest order of restitution or the claim will be barred on appeal.
- ***Fitzpatrick v. State***, No. 2014-KA-00252-SCT. Murder of a peace officer under § 97-3-19(2)(a) does not require a showing of malice aforethought or deliberate design. Where depraved heart is sufficient for a conviction as a matter of law, a showing of deliberate design is not required.
- ***Jackson v. State***, No. 2013-KA-02040-SCT. Prosecutor repeatedly stated defendant armed with a gun. This was a mistake, as defendant was alleged to have a knife. Although he corrected himself, this happened four times, but with no defense objections. There was also a send a message argument and a comment about defendant being caught "red-handed" when defendant had no evidence on him when arrested. Although not reversible error, the Court commented: "While we do not find reversible error under the facts of this specific case, prosecutors are now put on notice that such improper conduct is error. Because the State has now been warned, similar conduct by the prosecution is more likely to result in reversible error."

Quick Hits (cont.)

- ***Carr v. State***, No. 2013-CT-01013-SCT. *Gowdy v. State,* regarding sufficient notice before amending indictment to include habitual offender status, is not retroactive.
- ***Stallworth v. State***, No. 2013-CA-01643-SCT. No duty to register as a sex offender if conviction for the sex offense is expunged.
- ***Brown v. State***, No. 2014-CP-00434-COA. *Sanders v. State*, requiring a competency hearing once a mental evaluation is ordered, is not retroactive.